[redacted]

QUESTIONS PRESENTED

1. Whether, in order to establish a violation of Title VII, a plaintiff must prove not only that she was the victim of prohibited discrimination but also that the challenged employment decision would have been made in her favor in the absence of discrimination.

2. Whether a proven violator of Title VII may avoid a grant of specific relief to the injured employee unless it proves by evidence of a clear and convincing character that it would have taken the same employment action in any event for a separate lawful reason.

3. Whether it was clearly erroneous for the district court below to find that petitioner's denial of partnership to respondent was caused, in part, by her sex.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1167

PRICE WATERHOUSE,

Petitioner

v.

ANN B. HOPKINS,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT

STATEMENT

1. *Introduction.* Ann Hopkins proved that Price Waterhouse's rejection of her candidacy for partnership was caused, at least in part, by discrimination based on sex. In statutory terms, she proved that Price Waterhouse limited her chances for advancement by utilizing a partnership admissions process that "tend[ed] to deprive" her of employment opportunities because of her sex. *See* 42 U.S.C. § 2000e-2(a)(2). The central question in this case is whether Hopkins had to prove anything more than this in order to establish a violation of Title VII—specifically whether (as petitioner contends) Hopkins had the additional burden of proving that she would have become a partner in the absence of discrimination.

Acceptance of petitioner's contention—which was rejected by the courts below—would result in a significant erosion of Title VII's protections. This is not what the

statute says, it is not what Congress intended when it wrote the law, and it is inconsistent with the decisions of this Court in related areas.

2. *Hopkins' Credentials.* Price Waterhouse engages in accounting and management consulting in 90 offices across the United States. Organized as a partnership, the firm had 662 partners at the time this litigation began, of whom just seven were women. Ann Hopkins was a senior manager in Price Waterhouse's Office of Government Services in Washington, D.C., which specialized in securing and managing contracts with Federal agencies. Hopkins herself specialized in the application of computer-based technology to large information systems, and she was a stellar performer. She was instrumental in securing $34-$44 million in new business for Price Waterhouse, including contracts with the Departments of State and Agriculture, and she effectively managed the resulting engagements.

The district court found that Hopkins' "clients appear to have been very pleased with her work" (Petitioner's Appendix, hereafter "Pet. App.," 43a), and the record supports this. At trial, two senior Department of State officials, both at the Assistant Secretary level, testified for Hopkins. The Comptroller of the Department termed her performance "excellent" and said that she was "extremely competent, intelligent . . . strong and forthright, very productive, energetic and creative"—and that she had a sense of humor, too (Tr. 148, 150). The Assistant Secretary for Administration and Security agreed and said that he particularly prized Hopkins' "intellectual clarity"; he also said that he had tried to hire her to work at State (Tr. 156-57).

In the summer of 1982, the Office of Government Services nominated Hopkins for partnership in Price Waterhouse. Nomination is the first step in a complex admissions process that occurs annually and is about nine months in length. Scores of candidates are nominated

each year, and there is no ceiling on the number admitted. Hopkins was one of 88 candidates under consideration in the 1982-83 admissions cycle; the other 87 were men. She had brought in more new business than any of the men; indeed, none of the male nominees even approached the amount of business that she had generated. She had also billed more hours than any of the men (Pet. App. 4a). Her office's endorsement, which accompanied her nomination, said that

> Ann Hopkins performed virtually at the partner level for the U.S. State Department. While many partners were "involved" with the client, State Department officials viewed Ann as *the* project manager . . .
>
> * * * *
>
> In her five years with the firm, she has demonstrated conclusively that she has the capacity and capability to contribute significantly to the growth and profitability of the firm. Her strong character, independence and integrity are well recognized by her clients and peers. Ms. Hopkins has outstanding oral and written communication skills. She has a good business sense, an ability to grasp and handle quickly the most complex issues, and strong leadership qualities.

(Pl. Ex. 15; emphasis in original.)

In April 1983 Price Waterhouse admitted 47 of the 88 candidates. Hopkins was not among them; instead she was placed on "hold," which meant that she was eligible for future consideration, assuming renomination by her office. Later, after again being passed over for partnership, she left Price Waterhouse and filed an administrative charge of sex discrimination that culminated in this Title VII litigation.[1]

---

[1] It is the first rejection for partnership that is the subject of this petition. Hopkins was passed over the second time because two partners in her own office opposed her candidacy and the office therefore declined to renominate her. Unanimity is not required for a nomination, and a male candidate from St. Louis had been

3. *The Partnership Admissions Process.* Price Waterhouse's rejection of Ann Hopkins' candidacy for partnership was the product of a unique collegial decision-making process. The process begins with nomination of candidates by local offices. Thereafter any of the firm's partners, wherever located, may submit written comments on nominees (either "long form" or "short form," depending on how well a partner knows a particular candidate). In practice few partners submit comments. An Admissions Committee then considers the partners' written remarks as well as other comments—formal and informal—obtained during office visits and makes a recommendation to the Policy Board, the firm's governing body. The Policy Board makes the final decision on whether to admit a nominee to partnership.

As is apparent, there are many places in the admissions process where the final decision can be influenced —and hence where discrimination can affect the decision. Price Waterhouse pays especially close attention to negative comments about a candidate, and strong opposition by even a few partners may be sufficient to scuttle a candidacy. That is what happened to Ann Hopkins. The decision about her was made collectively, and a large number of men had a hand in it, including the members of the Admissions Committee and Policy Board. Even so, less than five per cent of Price Waterhouse's partners submitted written comments on Hopkins. Many of these were strong supporters. It was the negative comments of fewer than ten partners that blocked her admission.

Opponents focused not on Hopkins' objective qualifications—these were unquestioned—but rather on her "interpersonal skills." And as the district court found, most

---

nominated and admitted over the opposition of at least three partners in his office (Pl. Ex. 20). Given the difficulties that Hopkins had earlier encountered, however, the partners in her office believed that unanimity was needed for renomination, because "[w]ithout strong support within [her] office, it was felt that her candidacy could not possibly be successful" (Pet. App. 44a).

of the opposition appeared in "short form" comments from partners who had "limited contact" with her (Pet. App. 44a). Nevertheless, these comments were "determinative" (*id.*), because "the firm's evaluation process gave substantial weight" to the negative views (Pet. App. 58a). Put another way, "[t]he Policy Board gave great weight to the negative views of individuals who had very little contact" with Hopkins (Pet. App. 55a). Joseph Connor, the firm's Senior Partner and Chairman of its Policy Board, confirmed this, saying that "those who had less than full time involvement with Ann, were in effect the deciders on this one." [2]

Since Price Waterhouse acknowledged—and the district court found—that Hopkins' admission to partnership was thwarted by the views of a few men who did not know her well, the issue for Title VII purposes was whether the expression of these views was the product of sex discrimination. The question was not whether Hopkins was perfect in every respect; the court observed that her conduct provided "ample justification" for complaints about her (Pet. App. 47a). The inquiry, however, did not end there. For the issue was not whether there were grounds for concern but instead whether concern would have been expressed in the same fashion—and with the same degree of intensity—about a man.[3]

---

[2] J. Connor deposition 62. Mr. Connor's videotaped deposition was played at trial and is part of the record in this case (see R. 34 and Tr. 234-36).

[3] In its brief, petitioner dredges up every unflattering comment ever made about Hopkins and presents these in a one-sided fashion. Many of these concerned events early in her career at Price Waterhouse, i.e., before the summer of 1981 (Tr. 203); Thomas Beyer, the head of her office, said she "responded well" to discussions about these matters, so there was "no question . . . that Ann Hopkins was a valid partner candidate" at the time she was nominated in 1982 (Tr. 204). Indeed, virtually everyone who worked with Hopkins for any period of time admired and respected her. Thus three high level professionals who had served on her staff—a man and two women—testified on her behalf. All three said that she was demanding but fair (including the individual who remarked

Here it is significant that negative comments about interpersonal skills were commonplace in the admissions process at Price Waterhouse but did not necessarily prove fatal for male candidates. For example, in 1982 the Policy Board considered a man who conveyed the image of a "Marine drill sergeant" and who was said to be "crude, crass, etc." (Tr. 286-87). Joseph Connor acknowledged that this candidate's manner and style raised serious problems. Yet a member of the Policy Board defended the candidate, saying that "[h]e is a man's man; he is very direct," and the Board decided to admit him (*id.*; Pl. Ex. 20). A year later, at the same time that Hopkins was being considered, the Admissions Committee noted that another candidate was

> aggressive and self confident. It is apparent that he has, at times, carried these traits to excess with the result that a number of partners comment on him in such terms as "lacking maturity," "wise-guy attitude," "headstrong," "abrasive and overbearing" and "cocky." The . . . partners rate him relatively low in the managerial skills and personal attributes categories as a result of these traits.

(Pl. Ex. 25.) The Policy Board decided to admit this candidate, too. And when the Chairman of the Admissions Committee was asked at trial whether still other men had become partners despite concerns about their interpersonal skills, he responded, "Oh, yes" (Tr. 292).

---

about "diplomacy, patience and guts"), and all three said that they would like to work with her again (Tr. 417-440). Moreover, when Hopkins was assigned responsibility for managing her office's Word Processing Department in 1982, she performed better than the two partners who preceded her; Mr. Beyer said that this was because "she addressed the personal problems of people on the staff," which was "one of the first times . . . someone at that level, partner or manager . . . [got] involved with the people themselves" (Tr. 208-211). The point here is that the situation was much more complex and ambiguous than petitioner asserts. For this reason it was essential to inquire—as the district court did—whether Hopkins' sex contributed to the manner and intensity of the concerns expressed about her during the admissions process.

This did not mean that the men admitted despite these concerns were situated similarly to Hopkins; indeed the district court found otherwise. But this evidence did show that a perceived problem with interpersonal skills was not necessarily sufficient to defeat a candidacy. What was important was whether that concern was translated into strong opposition by some of the partners—as with Hopkins—or into mild criticism or even approbation ("[h]e is a man's man").

4. *The Decision of the District Court.* Hopkins alleged that she was denied partnership because of her sex, in violation of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* In determining whether the Act was violated, the district court separately considered three arguments, although it called them "closely interrelated" (Pet. App. 45a).

As noted above, the court did not find that concerns about Hopkins' interpersonal skills were groundless. Nor, as also noted, did the court find that liability could be established simply through a comparison between Hopkins and men who were admitted as partners despite concerns about their personalities. This was because the men and Hopkins were not similarly situated in all material respects. For example, some of the men were from other offices and had skills for which Price Waterhouse had special need, so that a special "business decision" was made to admit them. In addition, they had received fewer "no" votes, and the negative comments about them were "less intense" than those directed at Hopkins (Pet. App. 49a).

Petitioner trumpets these findings, but they did not resolve the vital question of whether the negative comments about Hopkins—and their intensity—resulted from sex discrimination. This was pivotal, since it was undisputed that Hopkins' candidacy was blocked by the negative views of partners who did not know her well. Addressing this point, the district court accepted Hopkins' central argument: "that she was not evaluated as

a manager, but as a woman manager, based on a sexual stereotype that prompts [some] males to regard assertive behavior in women as being more offensive and intolerable than comparable behavior in men because some men do not regard it as appropriate feminine behavior" (Pet. App. 51a).

The court detailed the evidence supporting this conclusion, including what the dissent below called a "smoking gun" (Pet. App. 31a): After Hopkins learned in the spring of 1983 that she had not been chosen as a partner, she discussed her chances for future selection with Thomas Beyer. Beyer was the partner-in-charge of her office and an ardent supporter, and the district court found that he was "responsible for telling [Hopkins] what problems the Policy Board had identified with her candidacy." Beyer advised her to

> walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.

(Pet. App. 52a.)

Petitioner has tried throughout this litigation to downplay the significance of this evidence, but it was telling in its own right and was also consistent with the other proof of a double standard. For example, the district court found that Hopkins' "[s]upporters indicated that her critics judged her harshly due to her sex" (Pet. App. 51a), and the Policy Board's decision on Hopkins recited that she had a "lot of talent" but needed "social grace" (Pet. App. 7a).

The court also considered the testimony of Dr. Susan Fiske, a "well qualified expert" whose credentials were not challenged by petitioner at trial (Joint Appendix, hereafter "J.A.," 25). As the court found,

> Dr. Fiske testified that situations, like that at Price Waterhouse, in which men evaluate women based on limited contact with the individual in a traditionally male profession and a male working environment foster stereotyping. One common form of stereotyping is that women engaged in assertive behavior are judged more critically because aggressive conduct is viewed as a masculine characteristic.

(Pet. App. 54a.)

In particular, Dr. Fiske testified that a well developed body of research documents the fact that certain conditions encourage stereotyping based on sex, that all these conditions were present at Price Waterhouse in the decisionmaking process on Hopkins' candidacy, and that the pattern of comments on Hopkins was consistent with the existence of stereotyping. Dr. Fiske concluded "with reasonable certainty" that sexual stereotyping played a "major determining role" in the decision about Hopkins (J.A. 28-29).

According to Dr. Fiske, conditions that foster stereotyping include "rarity"—the presence of only one or a handful of women in the group being evaluated—and the use of criteria and sources of information that are ambiguous. In Hopkins' situation rarity was easily established—she was the only woman among 88 candidates in the partnership pool—and the criteria relating to interpersonal skills (as opposed, say, to business generation) were ambiguous. In addition, the source of much information was also suspect, since many of the comments were based "on the briefest of encounters" with Hopkins (J.A. 33).[4] Analysis of the comments showed that Hopkins was specifically advised to behave more like a woman, and that conduct seen as "outspoken" or "independent" by her supporters became "overbearing" or "abrasive" when viewed by her opponents: "I see a very striking contrast in the way the same behavior gets framed" (J.A. 61). Dr. Fiske pointed out that the view of a forceful woman as abrasive is consistent with attitudes grounded on stereotypes (J.A. 30-31). She also

[4] This observation is in line with the district court's finding that Hopkins' candidacy was blocked by those who did not know her well (see text accompanying n.2, *supra*).

pointed to the extreme intensity of much of the opposition to Hopkins and said that this was likewise characteristic of stereotyping, particularly when voiced by those who did not know her well, *e.g.*, one partner calling Hopkins "potentially dangerous," another referring to her as "universally disliked" even though she had many strong supporters (J.A. 39, 60, 66).

Dr. Fiske's conclusion that sexual stereotyping played a major role in the decision on Hopkins was based not only on partners' evaluations but on the "convergence of . . . indicators" of stereotyping (J.A. 56):

> I drew the conclusion based on rather strong antecedent conditions, having somebody who was in an extreme minority condition, ambiguous criteria and ambiguous information[,] and there seemed to me what I call several converging indicators which included the categorical things, trying to get her to do things in a more feminine fashion. Charm school. Needs more social grace to overcompensate for being a woman. Those are comments that talk about behavior in light of her gender, her sex specifically. The overly intense negativity and the divided opinion that resulted from that, those are all factors that —all indicators that as a group, you know, contributed to my conclusion about the case.

(J.A. 76-77.) [5]

In addition to examining Price Waterhouse's treatment of Hopkins, the district court also found that other women had been rejected on similar grounds, *i.e.*, "because partners believed that they were curt, brusque and abrasive, acted like 'Ma Barker' or tried to be 'one of the boys'" (Pet. App. 52a). And the court found that one partner had "repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable

[5] Dr. Fiske's testimony was not idiosyncratic or based on her own subjective judgment. Instead her approach was entirely consistent with the consensus of researchers in her field. See generally the Brief for *Amicus Curiae* American Psychological Association.

of functioning as senior managers—yet the firm took no action to discourage his comments" (*id.*).

Based on its assessment of all the evidence, the district court found that "stereotyping played an undefined role in blocking [Hopkins'] admission to the partnership in this instance" (Pet. App. 54a). The court indicated that this was unconscious on the part of individual evaluators but carried the analysis "one step further" and surveyed the evidence showing that the Policy Board ignored "clear indications" of "discriminatory stereotyping" in the partnership admissions process (Pet. App. 55a). The court then found that:

> Although the stereotyping by individual partners may have been unconscious on their part, the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole.

(Pet. App. 56a.)

This was unlawful, since "[a] female cannot be excluded from a partnership dominated by males if a sexual bias plays a part in the decision and the employer is aware that such bias played a part in the exclusion decision" (*id.*). The court summarized its findings as follows:

> Comments influenced by sex stereotypes were made by partners; the firm's evaluation process gave substantial weight to these comments; and the partnership failed to address the conspicuous problem of stereotyping in partnership evaluations. While these three factors might have been innocent alone, they combined to produce discrimination in the case of this plaintiff. The Court finds that the Policy Board's decision not to admit the plaintiff to partnership was tainted by discriminatory evaluations that were the direct result of its failure to address the evident problem of sexual stereotyping in partners' evaluations.

(Pet. App. 58a-59a.)

Having found a violation of Title VII, the district court turned to relief.[6] The court termed the decision on Hopkins a "mixture of legitimate and discriminatory considerations" and noted that it could not say that she would have become a partner in the absence of discrimination (Pet. App. 59a). But after a violation had been established, the burden was on Price Waterhouse, because "once a plaintiff proves that sex discrimination played a role in an employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination" (*id.*). The court explained that, "[w]here sex discrimination is present, even if a promotion decision is a mixture of legitimate and discriminatory considerations, uncertainties must be resolved against the employer so that the remedial purposes of Title VII will not be thwarted by saddling an individual subject to discrimination with an impossible burden of proof" (Pet. App. 59a-60a). The court found that petitioner had not carried its burden (*id.*).[7]

5. *The Decision of the Court of Appeals.* The court of appeals affirmed the determination that Title VII had been violated. The court said that "Hopkins demonstrated, and the District Court found, that she was treated less favorably than male candidates because of her sex" (Pet. App. 19a). That is, she had shown that "her gender was a significant motivating factor in her failure to make partner" (Pet. App. 22a). The evidence noted by the court of appeals on this point consisted of

[6] This portion of the court's opinion is captioned "Remedy" (Pet. App. 59a).

[7] Ultimately the court declined to award specific relief on grounds unrelated to this petition: that Hopkins had not proved constructive discharge and had failed to present adequate proof on damages. The court of appeals reversed this aspect of the trial court's decision and remanded for entry of "full relief" (Pet. App. 28a). The propriety of this ruling is not an issue here.

the comments made by the partners about Hopkins,[8] the expert testimony, and comments made about other women candidates in prior years. Citing *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985), the court rejected Price Waterhouse's "piecemeal attack on the District Court's finding, . . . [which] ignores the fact that we must view the evidence in its entirety, and is in any event unequal to the task of demonstrating that the court's finding is clearly erroneous" (Pet. App. 12a).

The court of appeals understood that the record also contained, as the trial court had found, other reasons for concern about Hopkins. Thus this was a "case of mixed-motivation," since the district court had found that both lawful and unlawful motives "were significant factors in the firm's decision" on Hopkins (Pet. App. 25a).

Given this, the court of appeals held that Price Waterhouse could avoid a liability determination only by proving that "impermissible bias was not the determinative factor" in the decision on Hopkins (*id.*). The court said that such a showing must be made by clear and convincing evidence and noted that petitioner had not made it. Hence the court ruled that a violation had been established (*id.*).

In his dissent, Judge Williams had "no quarrel" with the principle that "a party acting with one permissible motive and one unlawful one may prevail only by affimatively proving that it would have acted as it did even if the forbidden motive were absent" (Pet. App. 38a). He believed, however, that there was insufficient evidence to support a finding that Hopkins' rejection was caused, even in part, by discrimination; *i.e.*, he felt that sexual

[8] These included various descriptions of Hopkins—from supporters as well as opponents—as "macho," "a somewhat masculine hard-nosed" manager, one who "overcompensated for being a woman," who needed a "course at charm school" (Pet. App. 12a-13a). Here the court saw as "[p]erhaps most telling . . . Price Waterhouse's desperate attempt to erase from the record Thomas Beyer's advice to Hopkins" to behave "more femininely" (Pet. App. 13a-14a).

stereotyping was "not plausibly related to the decision" on her candidacy (Pet. App. 39a).

In making this argument on insufficiency of evidence, Judge Williams tried to neutralize what he termed the "smoking gun"—Thomas Beyer's advice to Hopkins to behave more femininely (Pet. App. 31a). And on this point, he could only assert that the district court was "clearly erroneous" in finding that Beyer was speaking for the firm, *i.e.*, "in fulfillment of his 'responsib[ility] for telling [Hopkins] what problems the Policy Board had identified with her candidacy'" (*Id.*). Judge Williams' discussion of clear error did not mention either Rule 52, Fed. R. Civ. P., or this Court's treatment of the rule in the Title VII context in *Anderson* v. *City of Bessemer*, 470 U.S. 564.

SUMMARY OF ARGUMENT

Violation and remedy are separate matters under Title VII. *Fadhl* v. *City & County of San Francisco*, 741 F.2d 1163 (9th Cir. 1984). The initial question in any Title VII case—and the one on which the plaintiff at all times bears the burden of persuasion—is whether there has been a violation of the Act. Once a violation has been established, however, the employer has the opportunity to attempt to limit relief by proving that the challenged decision would have been the same even in the absence of discrimination. *See* 42 U.S.C. § 2000e-5(g). That is, after a violation has been proved, the burden of proof shifts to the employer to try to narrow the remedy due the plaintiff. The district court correctly applied these principles in finding that Price Waterhouse violated Title VII when it rejected Ann Hopkins' candidacy for partnership.

1. Some Title VII cases are amenable to binary analysis, and the trier of fact can determine that unlawful discrimination either was or was not the motivation for a particular employment decision. If it was, a violation is unquestionably established.

But sometimes the trier of fact may determine after reviewing the evidence that both lawful and unlawful motives contributed to a decision—that, as here, the "decision is a mixture of legitimate and discriminatory considerations" (Pet. App. 59a). In such a case, what happens if the plaintiff has not shown, in addition, that the challenged decision would have been made in his favor in a bias-free environment? Is a violation also established here?

Petitioner says no, but this is wrong. The plaintiff's burden of proving a Title VII violation is satisfied by showing that an unlawful factor contributed to an employment decision, even if lawful factors may also have been present. It would be "destructive of the purposes of [the Act] to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor." *Toney* v. *Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983). Such a requirement would also run counter to the statutory language, Title VII's history and the decisions of this Court in related contexts. (Our position on these points is in many respects similar to that of the Solicitor General; see Brief for United States.)

Title VII's prohibitions on employer conduct are set forth in Sections 703(a)(1) and (2), 42 U.S.C. § 2000e-2(a)(1),(2). Together, these two provisions make unlawful virtually any action affecting an employee taken "because of" the employee's race, color, religion, sex or national origin. These provisions penalize employer conduct—not thoughts—but nothing in the text of the statute limits liability to those situations in which an impermissible motive is the sole cause of a decision. On the contrary, Congress rejected an amendment to Section 703 providing that a violation would arise only if an employment decision was made "*solely* because of" an improper motive. 110 Cong. Rec. H2728, S13838 (1964).

In addition, Section 703(a)(2) makes it unlawful for an employer to "limit" his employees in any way that

would "deprive or *tend to deprive*" them of employment opportunities because of race, sex, etc. (emphasis supplied). This language plainly reaches the "mixed motive" case, since it is the very presence of a lawful motive that makes it uncertain whether unlawful discrimination has worked an absolute deprivation. What can be said in such situations is that there is a "tend[ency] to deprive" an employee of job opportunities, and the statutory text is clear that this is sufficient to establish a violation of the Act.

The 1972 amendments to Title VII highlight the Congressional purpose of purging the workplace of all discrimination. In 1972 Congress extended Title VII to Federal agencies by adding a new Section 717, 42 U.S.C. § 2000e-16, and the aim was to make the substantive law governing the private sector applicable to the Federal government. *Morton* v. *Mancari*, 417 U.S. 535, 547 (1974). Section 717(a) confirms that Title VII is violated whenever an unlawful motive contributes to an employment decision, since it provides that "all personnel actions affecting [Federal employees] . . . shall be made free from *any* discrimination . . ." 42 U.S.C. § 2000e-16(a) (emphasis supplied).

In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), the Court examined a procedure under which the General Counsel of the Labor Board satisfied his burden of proving an unfair labor practice by showing that an employment decision was caused "at least in part" by anti-union animus. *Id.* at 400 n.5. The employer could then avoid a "violation adjudication" (equivalent to a judicial finding of liability) by proving that the same decision would have been made even absent unlawful motivation. The Court approved this scheme and expressly rejected the contention—identical to petitioner's here—that the General Counsel had to prove "not only that a forbidden motivation contributed to the discharge but also that the discharge would not have taken place independently of the protected conduct." *Id.* at 400-401. The Court also observed that the Board could have chosen

to shift the burden at the remedy stage, *id.* at 402, as several courts have done under Title VII. In granting its approval, the Court noted that the Board had relied heavily on *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1974), a First Amendment case in which the Court held that the burden of proof shifted to the employer after the plaintiff showed that an impermissible motive "played a role" in his firing. *See Transportation Management Corp.*, 462 U.S. at 403.

The Court has ruled elsewhere that a plaintiff's burden of proof is satisfied by showing that an unlawful motive contributed to a decision, even if lawful motives were also present. *E.g., Mt. Healthy; Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976). Indeed, *Arlington Heights* characterized *Washington* v. *Davis* as holding that a plaintiff is "not require[d] . . . to prove that the challenged action rested solely on racially discriminatory purposes." 429 U.S. at 265. This is so because a legislative or administrative body rarely makes "a decision motivated by a single concern," so it cannot be said "even that a particular purpose was the 'dominant' or 'primary' one." *Id.* This is significant because Price Waterhouse's collegial partnership admissions process is a private sector analogue to a legislature; if anything, petitioner's system is even more amorphous, since there are no quantitative standards governing the number of votes needed for approval or rejection of a candidacy by the Policy Board.

The Court has also made clear that the question whether discrimination affected a decision is typically resolved on an up-or-down basis. This is because "[d]iscriminatory intent is simply not amenable to calibration. It is either a factor that has influenced the . . . choice or it is not." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 277 (1979).

Proof of invidious intent may take a "variety of forms," *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578

(1978), including proof of sexual stereotyping. *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978); *see also Fadhl* v. *City & County of San Francisco*, 741 F.2d at 1165. When a plaintiff uses any of these forms to show that discrimination has contributed to an employment decision, a violation of Title VII is established, whether or not lawful motives are also present.

2. Once a violation of the Act is proved, the defendant has the opportunity under Section 706(g), 42 U.S.C. § 2000e-5(g), to seek to limit specific relief—*i.e.*, hiring, reinstatement, promotion or back pay—by proving that the same decision would have been made in the absence of discrimination. Contrary to petitioner's contention, this is unquestionably the employer's burden because such evidence goes to remedy, not to liability. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). This burden shifting is appropriate because, as the Court has held under the NLRA, "[t]he employer is a wrongdoer . . . It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk . . ." *Transportation Management Corp.*, 462 U.S. at 403.

The defendant's burden of limiting relief must be discharged by clear and convincing evidence. This is a standard which concerns the clarity and objectivity of the employer's proof as much as its weight. Significant public interests are at stake in Title VII cases, especially after a violation of the Act has been established, and a higher standard of proof applies where the issue is the amount of relief due from a proven wrongdoer. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). Use of that approach is warranted here, because the "broad and insistent purposes [of Title VII] dictate that the employer be held to a strict showing, once discrimination has been established." *Day* v. *Mathews*, 530 F.2d 1083, 1086 (D.C. Cir. 1976). It is instructive that the Equal Employment Opportunity Commission, the

agency charged with enforcing Title VII, applies the clear and convincing standard in the Federal sector, where the Commission has binding regulatory authority. 29 C.F.R. § 1613.271.

3. Ann Hopkins proved a violation of Title VII in this case. As the Solicitor General acknowledges, there is sufficient evidence in the record to support a finding that the rejection of Hopkins' candidacy "was caused, at least in part, by an impermissible motive" (Brief for United States 27). The Solicitor General's reservation is simply that the district court did not make the necessary causal finding; hence he suggests a remand.

The district court's decision makes clear, however, that the court focused on causation. Price Waterhouse maintained a partnership admissions process that gave special weight to negative views. These views, especially from partners who did not know Hopkins well, were decisive ("those who had less than full time involvement with Ann, were in effect the deciders on this one"; see n.2, *supra*). The negative views were "influenced by sex stereotypes" (Pet. App. 58a). (As to this point, the government found especially instructive Thomas Beyer's advice to Hopkins to behave "more femininely," since Beyer was speaking for the Policy Board; Brief for United States 27). And finally, Price Waterhouse knew what was happening: "the maintenance of a system that gave weight to . . . biased criticisms was a conscious act of the partnership as a whole" (Pet. App. 56a).

In short, petitioner knowingly accorded special weight to negative views about Hopkins influenced by sex stereotypes and made no effort to discourage or discount such views. Hence the district court found that Hopkins had proved that "denial of partnership in her specific situation was *caused, in part,*" by petitioner's knowing failure to deal with discriminatory evaluations of her qualifications (Pet. App. 62a; emphasis supplied).

The district court's findings are a proper predicate for its determination that Title VII was violated. At a min-

imum, the partnership admissions system described in the court's findings—a system that "gave weight to . . . biased criticisms" (Pet. App. 56a)—"tend[ed] to deprive" Hopkins of opportunities for advancement because of her sex in violation of the Act. 42 U.S.C. § 2000e-2(a)(2). This is sufficient to establish a violation and to affirm the decisions below.

ARGUMENT

I. A VIOLATION OF TITLE VII IS ESTABLISHED IF THE PLAINTIFF PROVES THAT AN EMPLOYMENT DECISION WAS CAUSED, IN PART, BY DISCRIMINATION. THIS BURDEN MAY BE SATISFIED BY SHOWING THAT DISCRIMINATION "TENDED TO DEPRIVE" THE PLAINTIFF OF EMPLOYMENT OPPORTUNITIES.

Title VII's "central statutory purposes" are clear. The Act is aimed at "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). Congress implemented these purposes by creating in Section 703 of Title VII a series of unlawful employment practices aimed at employers, employment agencies, labor organizations and joint labor-management training programs. 42 U.S.C. § 2000e-2(a)-(d). The prohibitions on employer conduct are set forth in two provisions in Section 703(a), 42 U.S.C. § 2000e-2(a). Both alone and in concert, these constraints sweep broadly.

Section 703(a)(1) makes it unlawful for an employer to "fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." Under Section 703(a)(2), it is also unlawful for an employer "to limit, segregate, or classify his employees . . . in any way which would deprive or *tend to deprive* any individual of employment

opportunities or otherwise adversely affect his status as an employee because of" an impermissible reason (emphasis supplied).

Petitioner's principal contention in this case is that there can be no violation of Title VII unless the plaintiff has proved that unlawful discrimination was the "decisive factor" in a decision: "if the employment decision would have been identical even where discriminatory motives and expressions are wholly absent[,] there can be no violation" of the Act (Brief for Petitioner 23).

But on its face neither Section 703(a)(1) nor (2) limits an unlawful employment practice to the situation in which an impermissible motive is the sole or the dominant reason for the employer's action. On the contrary, both simply refer to conduct that occurred "because of" race, sex, etc. And here it is quite significant that both houses of Congress, when debating what eventually became Title VII, expressly rejected an amendment providing that a violation would arise only if an employment decision was made "*solely* because of" an unlawful motive. *See* 110 Cong. Rec. H2728, S13838 (1964).[9]

In addition, under Section 703(a)(2) an employer may not limit his employees in any way that would "deprive or *tend to deprive*" them of employment opportunities because of a criterion such as race or sex. The empha-

---

[9] In opposing this provision, Senator Case, the Republican floor manager of Title VII, stated:

> The difficulty with this amendment is that it would render title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of. But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.

110 Cong. Rec. S13837 (1964). Moreover, Senator Humphrey, the Democratic floor leader, said that the bill makes "it an illegal practice to use race *as a factor* in denying employment." *Id.* at S13088 (emphasis supplied).

sized language plainly reaches the mixed motive case, since it is the very presence of a lawful motive that may make it difficult to ascertain whether unlawful discrimination alone worked the deprivation. Often the most that can be said in such situations is that the proven discrimination "tends to deprive" an individual of job opportunities; yet the statutory text is clear that liability attaches if this degree of causation is established. This broad approach to violation is unsurprising, given the Congressional objective of "eradicating discrimination throughout the economy." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 421.[10]

Congress reaffirmed this objective in 1972 when Title VII was amended to extend its coverage to agencies of the Federal government. As this Court has observed, the purpose of this extension was to subject the Federal sector to the same substantive provisions of Title VII that already governed private employers: "In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government." *Morton* v. *Mancari*, 417 U.S. at 547; *see Chandler* v. *Roudebush*, 425 U.S. 840, 841 (1976). Hence it is significant that Congress, in applying the private standard to Federal agencies, specified that "all personnel actions affecting [Federal employees] . . . shall be made free from *any* discrimination based on race, color, religion, sex or national origin." 42 U.S.C. § 2000e-16(a) (emphasis supplied). It is clear that an employment decision based *in part* on discrimination would run afoul of this provision.

The vast majority of Title VII cases are susceptible to binary analysis; *i.e.*, the question is whether prohibited

[10] Although we agree with much of the Solicitor General's approach in this case, the government fails to address Section 703 (a)(2) and to give the statutory language its full intended effect. Analogies to the common law may be helpful, but they do not provide a complete answer. This is not a common law case, and the starting point must be analysis of the statutory text. *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982).

discrimination either was—or was not—the cause of a challenged employment decision. The defendant typically offers a legitimate explanation to justify its action, and usually the decision was made by one actor, such as a foreman or other supervisor, perhaps with concurrence by one or two others. Finally, there is often little or no direct evidence of discrimination, such as an epithet or other overt betrayal of bias.

It is the common case that is most amenable to the analytical framework created in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). The approach developed in these cases focuses attention on the employer's explanation for a challenged decision and permits use of circumstantial evidence to prove liability. Ultimately "the district court must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). If the employer's rationale is discredited, then the plaintiff normally prevails, for the inference drawn is that the discredited motive was a pretext for discrimination.

Contrary to petitioner's insistence, however, this Court has recognized that the *McDonnell Douglas/Burdine* framework is not the exclusive means of proving discrimination. Thus, in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985), the Court rejected the assertion that plaintiffs who had produced direct evidence of discrimination had failed to establish liability because they had not made out a prima facie case under *McDonnell Douglas*: "This argument fails, for the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." And the Court has also noted that *Burdine* is "inapposite" where a plaintiff has carried the burden of proving that an employment decision was taken, "at least in part," for unlawful reasons, because "[t]he Court [in *Burdine*]

discussed only the situation in which the issue is whether illegal or legal motives, but not both, were the 'true' motives behind the decision." *Transportation Management Corp.*, 462 U.S. at 400 n.5.

The Court has further emphasized that, once a case has been tried, preoccupation with the allocation of burdens specified in *McDonnell Douglas* and *Burdine* is misplaced and may obscure the central issue: "'[whether] the defendant intentionally discriminated against the plaintiff.'" *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. at 715 (citation omitted). In short, the *McDonnell Douglas/Burdine* framework is often useful but does not answer every question of proof posed in Title VII litigation. In particular, it does not address the situation where, after all the evidence is in, the trier of fact concludes—as the district court did here—that an employment "decision is a mixture of legitimate and discriminatory considerations" (Pet. App. 59a).

This is not to suggest that there are qualitative differences between the plaintiff's burden of proof in the single-motive cases most characteristic of *Burdine* and those cases in which a court finds mixed motivation. There are not. In all Title VII litigation, *Burdine's* basic underlying principle governs: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253. Of course, the same principle applies in unfair labor practice cases under the National Labor Relations Act. *See Transportation Management Corp.*, where the Court emphasized that "throughout the proceedings, the General Counsel [of the NLRB] carries the burden of proving the elements of an unfair labor practice." 462 U.S. at 401.

The question is not whether the plaintiff retains the burden of proving a violation but rather what satisfies that burden. Thus in *Transportation Management Corp.* the burden was discharged by a showing that an em-

ployee was fired "at least in part" because of anti-union animus. *See* 462 U.S. at 400 n.5. Yet once this burden was carried, the Court saw nothing inconsistent in the Labor Board's permitting an employer who wished to escape a violation adjudication—the functional equivalent of a liability determination under Title VII—to prove as an affirmative defense that the employee would have been fired even absent an unlawful motive.[11]

As this Court has observed, Title VII was modeled in key respects on the National Labor Relations Act. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 769 (1976). And in *Transportation Management Corp.* the Court sanctioned approaches to liability and relief under that Act that are similar to those employed below and by other Federal courts in Title VII cases. Moreover, the Court expressly rejected the argument—identical in form to that made by petitioner here—that the General Counsel of the Board "had the burden of showing not only that a forbidden motivation contributed to the discharge *but also that the discharge would not have taken place independently of the protected conduct of the employee.*" 462 U.S. at 400-401 (emphasis supplied).

Petitioner's position would, in Senator Cases's words, "render Title VII totally nugatory." 110 Cong. Rec. S13837 (1964) (see n. 9, *supra*). In recognition of this, the District of Columbia Circuit holds that, once a plaintiff proves that discrimination was applied against him with respect to a specific employment decision, "it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor." *Toney* v. *Block*, 705 F.2d at 1366. In similar

---

[11] The Court observed further that "[w]e also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication *but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer.*" *Id.* at 402 (emphasis supplied).

fashion, the Ninth Circuit has rejected the contention that an employer is not liable under Title VII unless the plaintiff can prove that she "would have been employed but for sex discrimination," saying that "[t]his contention confuses the separate issues of threshold liability and appropriate relief." *Fadhl* v. *City & County of San Francisco*, 741 F.2d at 1165. That court held that, "[w]hen an employer's discriminatory treatment consists of a failure to consider an applicant's qualifications, *or in the use of evaluative criteria that are discriminatory*, the applicant need not prove that he or she was qualified to fill the position in order to obtain some relief." *Id.* at 1165-66 (emphasis supplied).

In *Transportation Management Corp.*, the Court was sanctioning the Labor Board's approach to liability, rather than enunciating a test in the first instance. But the Court observed that the Board had borrowed heavily from what the Court itself had done in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, where

> we held that the plaintiff had to show that the employer's disapproval of his First Amendment protected expression *played a role* in the employer's decision to discharge him. If that burden of persuasion were carried, the burden would be on the defendant to show by a preponderance of the evidence that he would have reached the same decision even if hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights.

462 U.S. at 403 (emphasis supplied).

The Court has used varying formulations to describe the plaintiff's burden in the mixed motive setting, but the message has remained constant. Thus the Court has spoken of the need for a plaintiff to prove that an impermissible criterion was a "substantial factor" or a "motivating factor" in a challenged decision, *Mt. Healthy*, 429 U.S. at 287; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. at 270-71 n.21, or that it "contributed to" the decision. *Transportation Management Corp.*, 462 U.S. at 400-401. Also in *Transportation Management Corp.*, the Court said that in *Mt. Healthy* "we held that the plaintiff had to show that [an impermissible motive] *played a role* in the employer's decision to discharge him." 462 U.S. at 403 (emphasis supplied).

In none of these cases did the Court hold that a plaintiff must prove that an unlawful factor was the sole or dominant cause of a challenged action, or that the result would have been different in the absence of discrimination. On the contrary, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976), the Court rejected the notion that "the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies . . ." This was *dicta*, as was the proviso that "no more is required to be shown than that race was a 'but for' cause," *id.*, but the passage rejects an overly rigid approach to causation under Title VII and indicates that liability is fixed in a mixed motive case by proof that one of the motives was unlawful.

The same is true even where legislative or executive action is challenged as unconstitutional because it is based on discrimination:

> [*Washington* v.] *Davis* [426 U.S. 229] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

Arlington Heights, 429 U.S. at 265.

Arlington Heights is important not only because it shows that a discriminatory purpose need not be "dominant" or "primary" to trigger a violation. Also significant is its recognition that collegial decisions are especially likely to result from a mixture of motivations. And it is doubtful that there exists in the private sector a

more broadly based, collegial decisionmaking process—or one with more amorphous criteria—than that employed by Price Waterhouse to assess candidates for partnership.

The Court's treatment of *Washington* v. *Davis* in *Arlington Heights* merits special attention. *Davis* was an employment discrimination case brought under the Fifth Amendment, and the Court there declined to hold public employers defending constitutional claims to Title VII's higher standards. 426 U.S. at 247-48. Yet under *Davis* (as the cited passage from *Arlington Heights* makes clear), liability for an EEO violation under the Fifth or Fourteenth Amendments is established even if a discriminatory purpose is not "dominant" or "primary." It turns *Davis* on its head to argue—as petitioner necessarily must—that more is needed to prove a violation under Title VII than under the Constitution.

The Court has recognized that causation, especially in the context of discrimination, is not susceptible to precise mathematical formulation. Often the most that a trier of fact can do is to determine whether or not discrimination affected a result. What the Court said about this in assessing a legislature's motivation is equally applicable here:

> Invidious discrimination does not became less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. at 277 (footnote omitted).

The Solicitor General aspires to a degree of precision that is frequently unattainable. Thus the government posits a situation in which four negative votes may be sufficient to deny admission to partnership and says that discriminatory cause will be established if, *e.g.*, (1) a woman receives five negative votes, of which two are discriminatory, or (2) a woman receives four negative discriminatory votes and five negative legitimate votes (Brief for United States 14). We have no quarrel with this analysis in principle, but it cannot resolve this case or many others. Price Waterhouse did not set a fixed number of negative votes or comments that would disqualify a candidacy, and intensity of opposition—which cannot be measured by up or down votes—was an important element in the process. (One of the striking things about this case—and a key indicator that something was amiss—was the intense opposition voiced toward Ann Hopkins by a few men from other offices who barely knew her; see pp. 9-10, *supra*). Moreover, characterizing individual votes as either discriminatory or legitimate may itself be artificial and, among other things, fails to account for the influence that a particular partner or legislator motivated by bias may have on more fair-minded colleagues. Given these factors, all that can honestly be said by a trier of fact who, having heard the evidence, believes that discrimination affected a collegial decision is something very much like what the district court found here: "stereotyping played an undefined role in blocking plaintiff's admission to the partnership . . . ." (Pet. App. 54a).[12]

Of course, Title VII penalizes actions, not thoughts; hence the Act's prohibtions are directed at conduct, at "employment *practice*[*s*]," 42 U.S.C. § 2000e-2(a) (emphasis supplied). But this case is not about "thought control" or "discrimination in the air." While petitioner suggests that any discrimination in this case was insig-

[12] As noted above (p. 11), the district court did not rest on this alone. Since the stereotyping by individual partners may have been unconscious, the court believed that an additional element was needed to establish liability for intentional discrimination; this was the fact that "the maintenance of a system that gave weight to such biased criticisms [of Hopkins] was a conscious act of the partnership as a whole" (Pet. App. 56a). This focus on the action of the employer "as a whole," as opposed to its agents, may have been overly cautious (*see Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986)) and if anything gave the benefit of the doubt to petitioner.

nificant or *de minimis*, the courts below found otherwise. Indeed, the district court expressly rejected judicial involvement in insignificant matters and said that courts were not responsible for "polic[ing] every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex" (Pet. App. 55a). But that was not the situation here. Instead Price Waterhouse knowingly maintained a partnership admissions system in which negative views—views influenced by sex discrimination—were accorded disproportionate weight in the decision on Hopkins (Pet. App. 58a). The opinions below make it clear that Hopkins suffered not because of discrimination in the air but rather because of discrimination brought to ground and visited upon her.[13]

Proof of discrimination may take a "variety of forms." *Furnco Construction Corp.* v. *Waters*, 438 U.S. at 578. This includes evidence of sexual stereotyping, as "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 707. *See also Fadhl* v. *City & County of San Francisco*, 741 F.2d at 1165.[14] Where a trier of fact finds—on the

[13] Contrary to petitioner's assertion (Brief for Petitioner 20), the evidentiary support for the finding of discrimination was not limited to the expert testimony on stereotyping. Both the courts below and the Solicitor General were particularly impressed with the advice Thomas Beyer gave Hopkins to behave more femininely (see Brief for United States 27). The testimony of the expert was, however, consistent with this and other evidence of discrimination. As this Court has held, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 699 (1962).

[14] *Fadhl* and the present case vividly illustrate the "double bind" that afflicts victims of stereotyping. In *Fadhl* the plaintiff was criticized for behaving "too much like a woman," 741 F.2d at 1165, while here Hopkins was told to behave "more femininely." Where stereotyping is at work, a woman is "damned if she does and

basis of words, conduct or any of the "variety of forms" which evidence of bias may take—that discrimination affected an employment decision, a violation of Title VII is established.[15]

II. ONCE A VIOLATION HAS BEEN ESTABLISHED, THE EMPLOYER MAY LIMIT RELIEF BY PROVING THAT THE SAME DECISION WOULD HAVE BEEN MADE ABSENT DISCRIMINATION.

A. *The Employer Has the Burden of Proving that Relief Should Be Limited.*

Once a violation has been established, the inquiry turns to appropriate relief. Title VII's remedial provisions are set forth in Section 706(g), 42 U.S.C. § 2000e-5(g). *See Franks* v. *Bowman Transportation Co.*, 424 U.S. at 762. Under that section, specific relief—i.e., hiring, reinstatement, promotion or back pay—may not be decreed if the challenged decision was made "for any reason other" than prohibited discrimination. This permits the employer to limit the remedy upon a proper showing. But Section

damned if she doesn't." *See* J.A. 46 (testimony of Dr. Fiske); *see also* Prather, *Why Can't Women Be More Like Men: A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions*, 15 American Behavioral Scientist 172 (1971).

[15] Petitioner raises the specter of plaintiffs alleging mixed motivation in order to take advantage of what is erroneously said to be a more lenient standard of proof. This is specious. First, as we have shown, the plaintiff's burden of proof is the same in all Title VII cases. Second, as the Solicitor General points out, *defendants* are usually responsible for suggesting "multiplicity of motives" (Brief for United States 12). Third, a plaintiff will always have an interest in proving, if possible, that discrimination was the sole cause of a challenged action, since the existence of an independent legitimate cause may result in a limitation on relief (see Section II, *infra*). Fourth, and most significant, a case becomes one of mixed motivation not because a plaintiff or defendant characterizes it that way—but rather because the trier of fact determines that both lawful and unlawful motives contributed to an employment decision. *See NLRB* v. *Transportation Management Corp.*, 462 U.S. 393.

706(g) does not deal with violation. On the contrary, this provision is not even triggered unless the court first "finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . ." [16]

The relationship between Section 703(a), which defines violation, and the remedy provisions of Section 706(g) is well illustrated by early Title VII cases challenging job segregation. Maintenance of racially segregated jobs (or lines of progression) is unlawful, because it *tends* to deprive blacks of employment opportunities. Hence there is a violation of Section 703(a)(2). But specific relief will not be awarded to a particular black worker if the *employer* can prove that the employee would not have advanced in any event because of legitimate reasons. *See, e.g., Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974) ("appropriate to require the employer to show that its invidious limitations on free mobility were not the cause of the discriminatee's current position on the economic ladder").[17]

The Court adopted the distinction between liability and specific relief in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 361: "the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination." At that point, once it is shown that a particular employee sought a job, "the burden

[16] While the Court has sometimes debated the meaning of Section 706(g)—particularly whether it permits a remedy for individuals who were not themselves victims of discrimination—there has been no dispute that this provision is aimed at *relief*. *E.g., Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986); *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984).

[17] It was also in the early job segregation cases that the courts first held that relief under Title VII would be denied only if the employer proves by "clear and convincing evidence" that legitimate reasons justified its treatment of an employee. *E.g., Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 445 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d at 1380. (See Section II.B, *infra.*)

then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 362. *See Franks* v. *Bowman Transportation Co.*, 424 U.S. at 773 n.32 ("[n]o reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof" on a remedial issue).[18]

The point is that this Court and the lower courts have long recognized that an employer properly adjudged guilty of violating Title VII may still conceivably have a valid, independent reason for the challenged action. But the burden of limiting relief is on the employer.

The Court in *Transportation Management Corp.* explained the rationale for placing the burden of proof on the employer after the plaintiff has proved that an unlawful motive contributed to a decision:

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

462 U.S. at 403.

The NLRB shifts the burden or proof at the liability stage, thereby giving the employer a chance to avoid a violation adjudication—the equivalent of a liability determination in court—by proving that the same decision would have been made if the unlawful motive had not been present. The Court in *Transportation Management*

[18] The Court recognized the same principle in another Title VII case, *East Texas Motor Freight System Inc.* v. *Rodriguez*, 431 U.S. 395, 403 n.9 (1977) ("[e]ven assuming, *arguendo*, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event"). *See also Arlington Heights*, 429 U.S. at 270 n.21.

Corp. sanctioned this approach but also said that the Board could properly have treated such evidence "as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer." 462 U.S. at 402. Whether this shift is said to occur in connection with liability or relief, however, it has exactly the same trigger—a finding by the trier of fact that the plaintiff has carried the burden of proving that an unlawful motive affected the employment decision. *Id.*[19]

Under Title VII, this particular burden of proof properly shifts at the remedy stage after a violation has been established, as is evident from the text of Section 706(g), the controlling statutory provision. This section does not even come into play until the court has found that the employer "intentionally engaged in . . . an unlawful employment practice," and the most such an employer can do under Section 706(g) is to avoid certain specific remedies by proving that the challenged decision was made "for any reason other" than discrimination. 42 U.S.C. § 2000e-5(g). As the Solicitor General observes, other general relief remains available, such as an injunction against future discrimination and attorneys' fees (Brief for United States 23).

Injunctive relief may be crucial. Suppose, for example, that a black worker proves that an employer maintains racially segregated jobs, but the employer is able to show that the employee lacked qualifications for a "white" job. If such proof enabled the employer to escape liability altogether, it would be free to maintain the same segregated system in the future. This would be anomalous under a statute aimed at "eradicating discrimination throughout the economy," *Albermarle Paper Co.* v. *Moody*,

[19] References to the liability or relief "stages" of a Title VII case do not necessarily mean that there will be separate hearings on violation and remedy. In most individual cases, all evidence will be presented in one trial, but the issues of liability and relief remain analytically distinct.

422 U.S. at 421, and it is not what Section 706(g) envisions. Instead the employer's proof enables it only to avoid promoting the black worker and giving him back pay; the employer remains liable for a violation of Title VII and may be enjoined from maintaining the segregated system. Under Section 706(g), the burden of proof shifts to the employer at the relief stage of a Title VII case, after a violation of the Act has been established.[20]

Finally, it would be confusing doctrinally to have different rules governing burden shifting depending on whether the trier of fact determines that one or more than one motive contributed to an employment decision. In all Title VII cases, the plaintiff has the burden of proving a violation of the Act. In all cases—whether

[20] The court of appeals below appeared to treat this burden as shifting in connection with the liability determination (Pet. App. 25a; see p. 13, *supra*). Some courts have done the same, *e.g.*, *Blalock* v. *Metals Trades, Inc.*, 775 F.2d 703, 713 (6th Cir. 1985), while others have held that the burden of proof shifts in connection with a determination of remedy, *e.g.*, *Fields* v. *Clark University*, 817 F.2d 931, 936-37 (1st Cir. 1987); *Caviale* v. *Wisconsin Department of Health & Social Services*, 744 F.2d 1289, 1296 (7th Cir. 1984); *Bibbs* v. *Block*, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (en banc); *Fadhl* v. *City & County of San Francisco*, 741 F.2d at 1166-67. In *Miles* v. *M.N.C. Corp.*, 750 F.2d 867, 875-76 (11th Cir. 1985), the court held that the burden of proof shifted to the employer where direct evidence of discrimination was "accepted by the trier of fact" (*id.* at 875) but did not specify whether the shift occurred in connection with liability or relief.

We believe that the court of appeals below was incorrect in shifting the burden at the liability stage, but this was not harmful to petitioner. As we have shown, whether the shift is said to occur in connection with violation or remedy, it has the same trigger—i.e., proof accepted by the trier of fact that an unlawful motive affected the employment decision. *See Transportation Management Corp.*, 462 U.S. at 402. Given this, shifting the burden at the liability stage benefits the *employer* by giving it the opportunity to escape all consequences of a Title VII violation. Thus petitioner cannot complain about this aspect of the decision of the court of appeals. (The district court properly shifted the burden in connection with remedy, after it had found a violation of Title VII; Pet. App. 59a.)

involving a single or several motives—this burden is satisfied by proof that discrimination affected the challenged decision. And the employer always retains the opportunity to try to limit relief after the violation has been established.[21]

B. *The Employer's Burden of Limiting Relief Must Be Discharged by Clear and Convincing Evidence.*

Following a determination of a violation of Title VII, the plaintiff is entitled to at least "some relief." *Fadhl* v. *City & County of San Francisco*, 741 F.2d at 1166. As we have shown, however, the employer may limit specific relief upon a proper showing. 42 U.S.C. § 2000e-5(g). In the District of Columbia Circuit, this showing must be made by clear and convincing evidence. *Day* v. *Mathews*, 530 F.2d at 1085; *Toney* v. *Block*, 705 F.2d at 1366.[22]

Preponderance of the evidence is the customary standard in civil litigation, but the clear and convincing approach "is no stranger to the civil law," *Woodby* v. *INS*, 385 U.S. 276, 285 (1966), and has been employed where the "interests at stake . . . are deemed to be more substantial than mere loss of money," *Addington* v. *Texas*, 441 U.S. 418, 424 (1979). Thus this Court has required the party with the burden of proof to satisfy the clear

---

[21] See *Blalock* v. *Metals Trades, Inc.*, 775 F.2d at 712, in which the court could "discern no meaningful difference" between the plaintiff's burden to prove that an unlawful criterion was a "motivating factor" under *Mt. Healthy* or to prove under *Burdine* that an employment decision was "more likely than not motivated" by such a criterion. In the typical *Burdine* type case, it would be unusual, of course, for the employer to offer a second justification for its actions at the remedy stage.

[22] The Fifth and Ninth Circuits use the same standard, *e.g.*, *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d at 445 (5th Cir.); *Nanty* v. *Barrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981), while other courts speak of preponderant evidence, *e.g.*, *Fields* v. *Clark University*, 817 F.2d at 937 (1st Cir.); *Bibbs* v. *Block*, 778 F.2d at 1324 n.5 (8th Cir.); *Miles* v. *M.N.C. Corp.*, 750 F.2d at 875-76 (11th Cir.).

and convincing test in cases involving termination of parental rights,[23] civil commitment,[24] defamation,[25] deportation [26] and denaturalization.[27]

Petitioner argues that these cases applied the clear and convincing standard to *plaintiffs* and says that the test should not be applied to a *defendant*. This is simplistic at best. The issue is not the party's label but whether it has properly been assigned the burden of persuasion on a particular issue. And assuming the burden is properly assigned, the next question is the type of evidence that will satisfy the burden.

The employer bears the burden of limiting relief under Title VII. And this Court has long recognized that a different standard of proof may apply where the issue is the amount of relief due from a proven wrongdoer. Thus there is a "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. at 562. This is because "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

It was on the basis of decisions such as *Story Parchment* that the Fifth Circuit held under the National Labor Relations Act that "any doubts about entitlement

---

[23] *Santosky* v. *Kramer*, 455 U.S. 745, 769 (1982).

[24] *Addington* v. *Texas*, 441 U.S. at 432-33.

[25] *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 52 (1971).

[26] *Woodby* v. *INS*, 385 U.S. at 286.

[27] *Schneiderman* v. *United States*, 320 U.S. 118, 123-25, 158 (1943). As *Schneiderman* shows, *id.* at 123, the Court's primary concern was not that the quantum of proof be higher but that there be "evidence of a clear and convincing *character*" (emphasis supplied). See n.28, *infra*, and accompanying text.

to back pay should be resolved against the employer." *See Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d at 1380. This approach was then incorporated into Title VII, so that if an employer wishes to show in connection with relief that a black worker

> would not be qualified for any other job[,] then its proof must be clear and convincing. Any doubts in proof should be resolved in favor of the discriminatee giving full and adequate consideration to equitable principles.

Id. (footnotes omitted).

It is evident that the concern here is as much with the quality as the quantity of the employer's proof. Generalized testimonial assertions will not suffice to limit the remedy; instead evidence is needed that is persuasive in its own right, *e.g.*, proof that an employee did not meet objective, job related standards that had been consistently applied to others. *See Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d at 444.[28]

Concurring in *Toney* v. *Block*, 705 F.2d at 1373, Judge Tamm observed that a "higher standard of proof is justified by the consideration that the employer is a wrongdoer whose unlawful conduct has made it difficult for the plaintiff to show what would have occurred in the absence of that conduct." Consistent with this approach, the district court below held that, "[w]here sex discrimination is present, even if a promotion decision is a mixture of legitimate and discriminatory considerations, uncertainties must be resolved against the employer" (Pet. App. 59a). This, of course, recalls the principle in labor

[28] This approach was foreshadowed in school desegregation cases where courts required school boards seeking to dismiss black teachers to justify their position by clear and convincing evidence, which meant that the black educators had to be considered "*objectively* in comparison with *all* teachers." *Wall* v. *Stanly County Board of Education*, 378 F.2d 275, 278 (4th Cir. 1967) (emphasis in original). *See Rolfe* v. *Lincoln County Board of Education*, 391 F.2d 77, 80 (6th Cir. 1968).

as well as tort law that it rests upon the wrongdoer "to disentangle the consequences for which it was chargeable from those from which it was immune." *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938), *quoted in Transportation Management Corp.*, 462 U.S. at 399 n.4.

Once a violation of Title VII has been established, the strong presumption is that the plaintiff is entitled to full relief. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. at 421. The District of Columbia Circuit has relied in part on *Moody* in explaining why an employer wishing to avoid specific relief must produce clear and convincing proof, saying that

> [t]he reason for this is straightforward. "Unquestionably, it is now impossible for an individual discriminatee to recreate the past with exactitude." * * * Such a showing is impossible precisely because of the employer's unlawful action; it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem. Thus, once discrimination is shown, relief should not be narrowly denied. Moreover, the Supreme Court has recently emphasized that the purpose of Title VII is to "eradicat[e] discrimination throughout the economy and [to make] persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody*, . . . 422 U.S. at 421 . . . . The Court stressed: "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" *Id.* at 417-418. * * * *These broad and insistent purposes dictate that the employer be held to a strict showing, once discrimination has been established.*

Day v. *Mathews*, 530 F.2d at 1086 (emphasis supplied; footnote and some citations omitted).

A Title VII case, particularly one in which a violation has been established, is freighted with the public interest. The twin Congressional purposes of "eradicating discrimination" and "making persons whole" mean that, at this juncture of the litigation, the interests at stake transcend those of private parties and are "more substantial than mere loss of money." *Addington* v. *Texas*, 441 U.S. at 424. This is just the type of situation in which this Court has applied the clear and convincing standard.

In *Mt. Healthy*, where the burden of proof was shifted to the defendant in a First Amendment setting, the Court stated that the burden would be satisfied by preponderant evidence, although there was no discussion of this point. 429 U.S. at 287.[29] But the Court has also held that employers face more stringent standards under Title VII than in EEO cases arising under the Constitution. *Washington* v. *Davis*, 426 U.S. at 247-48 (see p. 28, *supra*).

There is reason for this. Title VII was designed to be remedial and was "directed at a historic evil of national proportions." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 416. Hence a court must exercise its remedial powers "'in light of the large objectives of the Act.'" *Id.*, *quoting Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944). The Civil Rights Act of 1964, of which Title VII is a vital component, remains the single most important piece of social legislation enacted by Congress in the post-war era. The Act has played a major role in permitting this nation to adjust relations between the races (and between men and women) in a largely peaceful fashion. As the court in *Day* v. *Mathews* recognized, the objectives of this legislation are best realized if an employer seeking

[29] The same appears to have been true of *Transportation Management Corp.*, in which the Labor Board relied on *Mt. Healthy* to fashion its rules of proof. *See* 462 U.S. at 403. In *Mt. Healthy*, the Court did not discuss the quality of evidence the employer would need to produce to satisfy its burden.

to avoid relief is held to a "strict showing" after liability has been established. 530 F.2d at 1086.[30]

It is significant that the Equal Employment Opportunity Commission, the agency principally responsible for enforcing Title VII, has adopted the clear and convincing approach in the Federal sector, the one arena where the Commission has binding regulatory authority. 29 C.F.R. § 1613.271. The Commission's views on Title VII are entitled to "great deference," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971),[31] and this is especially true where—as here—those views are expressed in a binding regulation, as opposed to a guideline. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-42 (1976).

The Commission applies the clear and convincing test at the relief stage. That is, 29 C.F.R. § 1613.271 deals only with "[r]emedial actions" and provides that relief for an employee will include retroactive promotion and back pay, "unless the record contains *clear and convincing evidence* that the employee would not have been promoted or employed at a higher grade, even absent discrimination." *Id.* at § 1613.271(c)(1) (emphasis supplied).

Petitioner argues that the Court should pay no attention to this regulation, asserting that EEOC is free to impose a higher standard on Federal agencies in the administrative setting than they would face in court (Brief

[30] The substantial importance that Congress attached to Title VII, and to civil rights statutes generally, is reflected in part by the fee shifting provision in the statute, Section 706(k), 42 U.S.C. § 2000e-5(k), which is a departure from the customary "American Rule" on fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975). This provision was intended to permit a plaintiff to act as a "'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). *See Albemarle Paper Co.* v. *Moody*, 422 U.S. at 415.

[31] *See also EEOC* v. *Commercial Office Products Co.*, —— U.S. ——, 108 S.Ct. 1666 (1988).

for Petitioner 41 n.21). Whatever the merits of this assertion, that is not what has happened. The Civil Service Commission, which formerly had enforcement authority over discrimination complaints against Federal agencies, believed that judicial decisions adopting the clear and convincing test correctly stated the law, and it embraced that standard in its own administrative processes. 43 Fed. Reg. 33732 (1978). EEOC, which obtained Federal sector enforcement responsibility under Reorganization Plan No. 1 of 1978, *reprinted in* 42 U.S.C.A. § 2000e-4 at 311, has adhered to the same standard. Moreover, as noted above, the same substantive principles govern Title VII cases in both the private and Federal sectors. *Morton* v. *Mancari*, 417 U.S. at 547.[32]

Ultimately, any distinction between the clear and convincing and preponderant standards is immaterial here. The disputed issue in this Court is whether a violation of Title VII was established, not whether proper relief was granted, and—as we have shown—the clear and convincing test comes into play only after the trial court has found a violation, when the burden has shifted to the employer to try to limit relief. In any event, petitioner never contended below that the proof it offered—which

---

[32] The Solicitor General's failure to comment on EEOC's position in the government's short discussion of the clear and convincing issue is curious (Brief for United States 23 n.10). Moreover, the government misreads the Court's recent decision in *Kungys* v. *United States*, —— U.S. ——, 108 S.Ct. 1537 (1988). Contrary to the government's assertion, Part II-A of the opinion (in which all members of the Court joined) expressly reaffirmed that in a denaturalization proceeding INS must prove the "materiality" of false statements by "clear, unequivocal, and convincing" evidence. 108 S.Ct. at 1547. In Part II-B—the portion of the opinion cited by the Solicitor General—the plurality does not retreat from this. Rather the plurality states that INS need not prove, in addition to materiality, that "naturalization would not have been granted if the misrepresentations or concealments had not occurred." *Id.* at 1549. Ironically, then, Part II-B rejects exactly the type of rigid "but for" causation advocated by petitioner here.

failed to meet the clear and convincing test—nevertheless satisfied the preponderance of the evidence standard. Even now, petitioner does not explain why this would be so.

III. THERE IS NO PERSUASIVE BASIS FOR OVERTURNING THE DISTRICT COURT'S FINDING THAT PETITIONER VIOLATED TITLE VII.

The Solicitor General's legal position is similar in most respects to ours. Thus the government believes that the plaintiff has the burden of establishing a violation of Title VII; that this burden is carried if a plaintiff proves that an unlawful motive was causally related to the challenged decision, even if lawful motives also played a role; and that—once violation is established—the burden shifts to the defendant to try to limit relief under Section 706(g) by providing that the same decision would have been reached in a bias-free setting.

The Solicitor General also acknowledges that "[t]here may be sufficient evidence in the record to support a finding that an illegal motive caused petitioner's employment decision" (Brief for United States 27). Here the government points to Thomas Beyer's advice to Ann Hopkins to behave "more femininely" as evidence that "could support a finding that the decision to deny respondent partnership was caused, at least in part, by an impermissible motive" (*id.*; footnote omitted).[33] The government

---

[33] Unlike the dissent below, the Solicitor General sees nothing clearly erroneous in the district court's treatment of Beyer's advice. As the government observes, the trial court found that Beyer was speaking for the partnership, and the record supports this determination. For example, a member of the Policy Board testified that he had "no doubt that Tom Beyer would be the one that would have to talk with her [Hopkins]. He knew exactly what the problems were" (Pet. App. 14a). Perhaps even more significant, Joseph Connor, Price Waterhouse's Senior Partner, acknowledged that he discussed Hopkins' candidacy with Beyer at the time the Policy Board was considering her (J. Connor deposition (see n.2, *supra*) at 87-88). There can be no question that the district court's treatment of Beyer's advice is "plausible in light of the record viewed

also notes that comments made by some of the partners (*e.g.*, "charm school," "macho") are "consistent with this assessment of the reasons for the Policy Board's decision" (*id.*).[34] The Solicitor General's reservation is not whether the record in this case would support a finding that Hopkins' rejection "was caused, at least in part, by an impermissible motive"—clearly it would—but instead is whether the district court made such a determination. Hence the government suggests a remand so the court can "clarify its findings" (*id.* at 28).

We believe that the Solicitor General's uncertainty on this point is unwarranted. No special formulations are required, and the district court quite clearly found that Hopkins' rejection was caused, in part, by discrimination (Pet. App. 56a, 58a-59a, 62a). The government agrees that such a finding would have support in the record. It is therefore shielded from attack on appeal. *Anderson* v. *City of Bessemer*, 470 U.S. at 573.[35]

---

in its entirety," *Anderson* v. *City of Bessemer*, 470 U.S. at 574, so its findings here are immune from attack. *Id.*

[34] The Equal Employment Advisory Council suggests that such comments should have been disregarded, citing cases holding that epithets and other derogatory remarks about a person's race or age or sex are irrelevant unless made by the decision maker (Brief for EEAC 16). This misses the point. Such comments are relevant in this case precisely because those partners with negative views *were* the effective decision makers: "those who had less than full time involvement with Ann, were in effect the deciders on this one" (see n.2, *supra*).

[35] The government may have been misled by the district court's statement that petitioner "had legitimate, nondiscriminatory reasons for distinguishing between [respondent] and the male partners with whom she compares herself" (see Brief for United States 28). But Hopkins had advanced more than one argument on liability, and in the quoted statement the court was addressing one of Hopkins' alternative theories—not the argument on which liability was grounded (see pp. 7-8, *supra*). This Court has recognized that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing [an award of attorneys'] fee[s]." *Hensley* v. *Eckerhart*, 461 U.S. 424, 435

The district court focused on the causal connection between discrimination and the partnership denial. The court's opinion is cautious and understated and was premised on its refusal to "accept the view that Congress intended to have courts police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex" (Pet. App. 55a). Hence it is clear that the court rejected the notion that mere "discrimination in the air"—or, in the Solicitor General's phrase, "stereotyping, without more" (Brief for United States 24)—violates Title VII. But that was not the situation here.[36]

It was because of the negative views of some partners who did not know her well that Ann Hopkins did not become a partner at Price Waterhouse. The district court found this—"[t]he Policy Board gave great weight to the negative views of individuals who had very little contact" with Hopkins (Pet. App. 55a)—and the firm's Senior Partner confirmed it: "those who had less than full time involvement with Ann, were in effect the *deciders* on this one" (emphasis supplied; see n.2, *supra*). The court cautioned, however, that this "emphasis on negative comments did not, *by itself*, result in discriminatory disparate treatment" (Pet. App. 50a; emphasis supplied). Rather, this was only the first of three links that forged the causal chain.

The second link was the fact that partners' views on Hopkins were "influenced by sex sterotypes" (Pet. App. 58a). This finding was amply supported (*see, e.g.*, nn. 33-34, *supra*, and accompanying text), but here again

---

(1983). This presumes, of course, that a trial court may properly reject one of plaintiff's grounds and still find liability on another, as the court did here.

[36] Our difference with the Solicitor General on this point concerns his seeming inattention to the evidence that a handful of negative comments by partners suffices to defeat a partnership candidacy at Price Waterhouse. In his dissent below, Judge Williams also appeared to ignore this pivotal fact.

the district court was careful to observe that stereotyping —alone—does not violate Title VII. Thus "[t]he comments of the individual partners and the expert evidence . . . do not prove an intentional discriminatory motive or purpose" (Pet. App. 54a).

Instead, the "[c]omments influenced by sex stereotypes" acquired power precisely because "the firm's evaluation process gave [them] substantial weight" (Pet. App. 58a). Thus these two factors operated in tandem to Hopkins' detriment. And this was not inadvertent: "the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole" (Pet. App. 56a). This was the third and final link in the chain of causation.

In short, the district court found not merely that partners at Price Waterhouse entertained sexual stereotypes when evaluating Hopkins, but also that the firm acted on those stereotypes. As the Solicitor General points out, evidence of stereotyping is just one of many forms that proof of discrimination may take (Brief for United States 27). But it is a form in which Congress has evinced a special interest. For example, the Senate committee report on the Equal Employment Opportunity Act of 1972, which amended Title VII, reflected the legislative concern with "stereotypical misconceptions by supervisors regarding minority group capabilities." S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971). The House committee report employed virtually identical language. H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971).[37] Moreover, in construing Title VII, this Court has held that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females," *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 707 and that, "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike

[37] The House committee used the term "stereotyped" rather than "stereotypical."

at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *id.* at n.13, *quoting Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). *See Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 729 (1982) ("excluding males from [nursing school] tends to perpetuate the stereotyped view of nursing as an exclusively woman's job").

Given the legislative history of Title VII and this Court's decisions, it is evident that the district court was not plowing new ground in ruling that an employer who acted on stereotypes about women violated the Act. *See also Fadhl* v. *City & County of San Francisco*, 741 F.2d at 1165; *Lynn* v. *Regents of the University of California*, 656 F.2d 1337, 1343 n.5 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982).[38]

Price Waterhouse does not have defined standards for accepting or rejecting a candidate for partnership based on negative comments. Thus the trial court candidly declined to try to measure the precise effect of discrimination and found rather that "stereotyping played an undefined role in blocking plaintiff's admission to the partnership in this instance" (Pet. App. 54a). This was sufficient: "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the . . . choice or it is not." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. at 277. Here the court found that it was a factor.[39]

[38] *Fadhl* shows that proof that discriminatory stereotyping affected conduct need not be grounded on the testimony of an expert, since it does not appear that an expert testified on this issue in *Fadhl*. In the present case, however, the evidence of discrimination—strong in its own right—was buttressed by entirely consistent expert testimony. See n.13, *supra*.

[39] It is evident that by "undefined" the trial court meant unquantifiable, not negligible or insignificant, for the court forcefully rejected judicial intervention in insignificant matters and said that judges should not "police every instance where subjective judgment may be tainted" by sex-based assumptions (Pet. App. 55a).

In the order accompanying its opinion, the district court stated that Hopkins had "prevailed on the merits of her claim that denial of partnership in her specific situation was *caused, in part*, by defendant's failure to protect against the presence of sex discrimination in evaluations of her qualifications for partnership . . ." (Pet. App. 62a; emphasis supplied). This is a straightforward determination of causation. And contrary to petitioner's suggestion, the court was not imposing any novel affirmative action requirement on Price Waterhouse. Petitioner knew that "[c]omments influenced by sex stereotypes were made by partners" and that "the firms' evaluation process gave substantial weight to these comments"—yet the firm did nothing about this (Pet. App. 58a). Instead, it "failed to address the conspicuous problem of stereotyping in partnership evaluations" (*id.*).

This last element was important to the district court's determination on liability. In the court's view, petitioner could not be charged with responsibility unless the "partnership as a whole" knew that its admissions system "gave weight to . . . biased criticisms." This was a cautious approach (see n. 12, *supra*), but the court found the requisite knowledge. And of course, if the partnership knew of the problem and had tried to rectify the situation, then it might not be proper to hold the firm culpable for the views of "rogue" partners. But this was not the situation here. Price Waterhouse knew what was happening and did nothing about it. This was intentional disparate treatment.

There is no mistaking the thrust of the district court's findings. As the court of appeals held, "Hopkins demonstrated, and the district court found, that she was treated less favorably than male candidates because of her sex" (Pet. App. 19a). That is, she proved "her gender was a significant motivating factor in her failure to make partner" (Pet. App. 22a). Of course, other motives were also present, and both lawful and unlawful motives "were significant factors in the firm's decision"

on Hopkins (Pet. App. 25a). Thus this was a "case of mixed-motivation" (*id.*).

Petitioner repeatedly implies that it was the court of appeals which first characterized this as a case of mixed motives (*e.g.*, Brief for Petitioner 2, 43). This is plainly wrong. It is the findings of the trier of fact that determine whether multiple motives are at work (see n. 15, *supra*), and here the trial court determined that the deciison on Hopkins' candidacy was "a mixture of legitimate and discriminatory considerations" (Pet. App. 59a).

The district court found that "[d]iscriminatory stereotyping of females was permitted to play a part" in the decision on Hopkins (Pet. App. 58a). This was intentional. And there can be no question that petitioner's "maintenance of a system that gave weight to . . . biased criticisms" (Pet. App. 56a) violates Title VII, since—at a bare minimum—this was a "limit[ation]" on Hopkins that "tend[ed] to deprive [her] of employment opportunities . . . because of" her sex. 42 U.S.C. § 2000e-2(a)(2).

In *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984), this Court held that decisions on advancement to partner status are governed by Title VII. Partnership decisions are made collectively and, as this case shows, are often the product of a complex procedure and more than one motive. In this situation, it would be extraordinarily difficult for any employee to carry what petitioner contends is this plaintiff's burden—to prove that she would have become a partner except for discrimination. Acceptance of this contention would rob *Hishon* of any meaning and, as we have shown, would be contrary to Title VII's language, history and purposes.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JAMES H. HELLER
Counsel of Record
DOUGLAS B. HURON
KATOR, SCOTT & HELLER
1029 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 393-3800

June 1988